

John J. Egbert - 011469

[johnnegbert@jsslaw.com](mailto:johnnegbert@jsslaw.com)

Paul G. Johnson – 010309

[pjohnson@jsslaw.com](mailto:pjohnson@jsslaw.com)

JENNINGS, STROUSS & SALMON, P.L.C.

A Professional Limited Liability Company

The Collier Center, 11<sup>th</sup> Floor

201 East Washington Street

Phoenix, Arizona 85004-2385

Telephone: (602) 262-5911

Attorneys for Plaintiff Salt River Project  
Agricultural Improvement and Power District

Lisa M. Coulter - 010199

[lcoulter@swlaw.com](mailto:lcoulter@swlaw.com)

SNELL & WILMER, LLP

One Arizona Center

400 E. Van Buren

Phoenix, Arizona 85004-2202

Telephone: (602) 382-6000

Attorneys for Plaintiff Headwaters Resources,  
Inc.

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

Salt River Project Agricultural  
Improvement and Power District, a  
municipal corporation and political  
subdivision of the State of Arizona,  
Headwaters Resources, Inc., a Utah  
corporation,

Plaintiffs,

vs.

Reynold R. Lee, Casey Watchman, Woody  
Lee, Peterson Yazzie, Evelyn Meadows,  
Honorable Herb Yazzie, Honorable Louise  
G. Grant, Honorable Eleanor Shirley,  
Leonard Thinn and Sarah Gonnig,

Defendants.

No. CV 08-8028-PCT-JAT

**SECOND JOINT PROPOSED  
CASE MANAGEMENT PLAN**

(Rule 16 Scheduling Conference set  
for June 1, 2010 at 11:00 a.m.)

1 In accordance with the Court's Order of April 21, 2010 (Doc. #110), the Parties  
2 hereby submit their Joint Proposed Case Management Plan, which they ask the Court to  
3 adopt.  
4

5 **1. THE NATURE OF THE CASE:**

6 The Salt River Project Agricultural Improvement and Power District ("SRP") is a  
7 municipal corporation and political subdivision of the State of Arizona. It operates an  
8 electrical plant known as the Navajo Generating Station ("NGS"), located near Page,  
9 Arizona. NGS is owned by SRP and several other entities ("the Participants"). NGS is  
10 located on the Navajo Indian reservation pursuant to a lease between the Navajo Nation  
11 and the Participants (the "1969 Lease"), and pursuant to rights-of-way which the United  
12 States Secretary of the Interior ("the Secretary") granted to the Participants, pursuant to  
13 25 U.S.C. § 323 (the "§ 323 Grant"). Headwaters is a contractor hired by SRP to perform  
14 work at NGS.  
15  
16

17 Reynold R. Lee is the Director of the Office of Navajo Labor Relations ("ONLR").  
18 Casey Watchman, Woody Lee, Peterson Yazzie and Evelyn Meadows are members of  
19 the Navajo Nation Labor Commission (the "NNLC"). The Honorable Herb Yazzie is  
20 Chief Justice of the Navajo Nation Supreme Court; the Honorable Louise G. Grant and  
21 the Honorable Eleanor Shirley are Justices of the Navajo Nation Supreme Court. All of  
22 these Defendants are collectively referred to as the "Navajo Official Defendants."  
23

24 Leonard Thinn is a member of the Navajo Nation and a former employee of SRP. Sarah  
25 Gonnies is a member of the Navajo Nation and a former employee of Headwaters. Thinn  
26

1 and Gonnie are collectively referred to as the “Individual Defendants.”

2 Thinn and Gonnie worked at NGS and were terminated from their employment  
3 there. They separately filed complaints with ONLR, which issued right-to-sue notices to  
4 both. Thinn and Gonnie then filed complaints with the NNLC alleging that their firings  
5 at NGS violated a tribal ordinance, the Navajo Preference in Employment Act (“NPEA”).  
6 Both SRP and Headwaters filed motions to dismiss with the NNLC, alleging that it did  
7 not have jurisdiction. The NNLC granted both motions, and Thinn and Gonnie filed  
8 notices of appeal with the Navajo Nation Supreme Court, which consolidated the cases.  
9 After briefing and oral argument, the Navajo Nation Supreme Court issued an opinion  
10 concluding that the NNLC had jurisdiction and that the NPEA applied to both SRP and  
11 Headwaters. The court remanded the Thinn and Gonnie matters back to the NNLC.  
12

13 The NNLC set hearings in both cases. SRP then submitted a letter to the Secretary  
14 pursuant to the dispute resolution procedure set forth in the 1969 Lease for disputes  
15 between the Participants and the Navajo Nation. After the NNLC denied stays in the  
16 proceedings, SRP and Headwaters filed this federal action. Subsequently, the NNLC  
17 stayed the Thinn and Gonnie hearings pending the Secretary’s decision with regard to  
18 SRP’s letter. The Secretary exchanged several letters with counsel for SRP and the  
19 Navajo Official Defendants.  
20  
21  
22

23 Plaintiffs brought this action seeking declaratory and injunctive relief, prohibiting  
24 the Navajo Official Defendants from enforcing the NPEA at NGS or otherwise  
25  
26

1 attempting to regulate Plaintiffs' employment relationships. (SRP also invoked a dispute  
2 resolution procedure in the 1969 Lease with respect to claims directly against the Navajo  
3 Nation). This Court granted the Navajo Official Defendants' motion to dismiss, which  
4 argued that the claims in this litigation had to be submitted to the Secretary. The Ninth  
5 Circuit reversed and remanded for further proceedings.  
6

7 Prior to the grant of the motion to dismiss and the resulting appeal, the parties had  
8 fully briefed cross-motions for summary judgment concerning the merits of Plaintiffs'  
9 claims. The Court has not yet decided the merits of these cross-motions for summary  
10 judgment.  
11

12 A. Plaintiffs' Claims.

13 Plaintiffs describe their claims as follows:

14 Relying on both the § 323 Grant and the 1969 Lease, SRP and Headwaters have  
15 filed this action to obtain: (1) a declaratory judgment that, during the term of the 1969  
16 Lease, the Defendants may not apply the NPEA to SRP or Headwaters at NGS, and that  
17 any employment actions or grievances by present or former employees at NGS are not  
18 subject to adjudication or other forms of regulation by the ONLR, the NNLC or the  
19 Navajo Nation Supreme Court; and (2) an injunction prohibiting Defendants from taking  
20 any action inconsistent with that declaration. Plaintiffs would also seek interim  
21 injunctive relief if it is necessary to stop any such actions until a decision is reached on  
22 these issues.  
23  
24

25 The principal bases of Plaintiffs' claims are: (1) the rights of exclusive possession  
26

1 and quiet enjoyment of the lands on which NGS is built, and other rights granted under  
2 the § 323 Grant, in light of the *Montana* analytical framework; and (2) a covenant in the  
3 1969 Lease by which the Navajo Nation covenanted that “other than as expressly set out  
4 in this Lease, it will not directly or indirectly regulate or attempt to regulate the Lessees  
5 in the construction, maintenance or operation of the Navajo Generation Station.”  
6 Interpreting a nearly identical non-regulation provision in a lease between the Navajo  
7 Nation and the Arizona Public Service Company (“APS”), related to the Four Corners  
8 Power Plant, this Court (Judge Broomfield) and the Ninth Circuit enjoined tribal officials  
9 from enforcing the NPEA against APS. *See Arizona Public Service Co. v. Aspaas*, 77  
10 F.3d 1128 (9<sup>th</sup> Cir. 1996).

13 B. Defendants’ Defenses.

14 The Navajo Official Defendants describe their defenses as follows:

15 SRP and the Navajo Nation have an agreement that any dispute arising under the  
16 1969 Lease will be resolved through an alternative dispute resolution process. SRP  
17 invoked that process. The Ninth Circuit concluded the Secretary addressed SRP’s  
18 request by concluding in his May 10, 2008 letter that the Navajo Nation had not waived  
19 its jurisdiction over employment practices at NGS and the Secretary later declined to  
20 reconsider that decision. This case should be dismissed because SRP’s only remedy is to  
21 appeal the Secretary’s decision, which it has not done here.

24 The Navajo Nation properly exercised jurisdiction over the Thinn and Ginnie  
25 disputes because it has retained inherent sovereignty over employment on the Navajo  
26

1 Reservation and because SRP entered into a consensual relationship with the Navajo  
2 Nation through the 1969 Lease. Furthermore, Plaintiffs are bound by the Navajo  
3 Supreme Court opinion in the consolidated Thinn and Gonnies case, which found that the  
4 Commission has jurisdiction over NGS and that the NPEA is applicable to the employees  
5 at NGS. Accordingly, Plaintiffs' claims are barred by the doctrines of res judicata and  
6 collateral estoppel. Moreover, the Ninth Circuit's opinion in *Arizona Public Service Co.*  
7 *v. Aspaas*, 77 F. 3d 1128 (9th Cir. 1996), is not controlling in this case because *Aspaas*  
8 was decided without the benefit of the Navajo Supreme Court's decision here that, as a  
9 matter of Navajo law, the Navajo officials responsible for negotiation and approval of the  
10 1969 Lease were without authority to waive Navajo jurisdiction over employment  
11 matters at NGS. Additionally, *Aspaas* is not controlling because it is distinguishable on  
12 the facts in that *Aspaas* was an interpretation of a different lease between different  
13 parties.  
14

15  
16 Plaintiffs also cannot obtain the relief they seek because they failed to join  
17 indispensable parties, namely the United States, which cannot be joined because it has  
18 not waived sovereign immunity for this action. Finally, Plaintiffs' claims are barred by  
19 the doctrine of unclean hands, which has arisen out of decades of improper treatment of  
20 Navajo employees at NGS, and by Plaintiffs' knowing and voluntary assumption of the  
21 risk that Navajo laws and jurisdiction would control at NGS, which is located on the  
22 Navajo Reservation.  
23  
24  
25  
26

1 Defendants Thinn and Gonnies describe their defenses as follows:

2 Plaintiffs assert the jurisdiction of this Court based upon 28 U.S.C. § 1331 and 28  
3 U.S.C. § 1337. The federal courts do not have jurisdiction under these statutes.

4  
5 Defendants Thinn and Gonnies submit that the only legitimate issue before the federal  
6 courts is the question of whether the Navajo court system has jurisdiction over this  
7 dispute. Unless the Court determines that Navajo courts lacked jurisdiction, proper  
8 deference to the tribal court system precludes relitigation of issues raised by Plaintiffs  
9 and resolved in the Tribal Courts. In this case, the lease provisions at issue were  
10 interpreted by the Navajo Supreme Court, and that Court found that the lease provisions  
11 did not prevent the application of Navajo employment law to the Defendants. The federal  
12 courts should respect this ruling.

13  
14 The Navajo Nation has the sovereign right to regulate the employment conditions  
15 faced by enrolled members employed on leased tribal land, even where the tribal land has  
16 been leased by a private corporation. The U.S. Supreme Court has recognized that  
17 sovereign right and has never taken that right away in any case. The right to regulate was  
18 certainly not lost in *Montana*, which provided that when parties such as the Plaintiffs  
19 enter into consensual relationships with the tribe, the tribe has the right to regulate.  
20 Defendants Thinn and Gonnies contend the right to regulate Plaintiffs as employers  
21 continues and validates the action of the Navajo Nation Supreme Court in this case.

22  
23  
24 **2. THE JURISDICTIONAL BASIS OF THE CASE:**

25 Plaintiffs rely on 28 U.S.C. §§ 1331, 1337. Defendants Thinn and Gonnies dispute  
26

1 the Court's subject matter jurisdiction.

2       **3.     PARTIES AND STATUS OF SERVICE:**

3 All parties have been served, and all parties have answered.

4       **4.     PARTIES NOT SUBJECT TO THE COURT'S JURISDICTION:**

5 All parties are subject to this Court's personal jurisdiction.

6       **5.     REFERENCE TO ARBITRATION, SPECIAL MASTER OR**  
7                   **MAGISTRATE JUDGE:**

8 The parties agree that this case should not be referred to arbitration, special master  
9 or Magistrate Judge.

10       **6.     STATUS OF RELATED CASES:**

11 There are no related cases before any court.

12       **7.     DISCLOSURES:**

13 All parties exchanged their initial disclosures under Rule 26(a)(1), Fed. R. Civ. P.,  
14 in May 2008.

15       **8.     PROPOSED DEADLINES FOR:**

16       A.     Filing Motions to Amend the Pleadings: Within thirty (30) days  
17 after the Court enters its ruling on the pending motion to dismiss.

18       B.     Disclosure of Expert Testimony:

- 19           1.     Plaintiffs' expert disclosure:   October 29, 2010  
20           2.     Defendants' expert disclosure: November 29, 2010  
21           3.     Rebuttal expert disclosure:    December 17, 2010



1 C. Discovery: March 18, 2011

2 D. Filing Dispositive Motions: Within thirty (30) days after the Court  
3 enters its ruling on the pending motion to dismiss, the parties may  
4 simultaneously file brief (but optional) supplements to the currently  
5 pending cross-motions for summary judgment, not to exceed ten  
6 (10) pages.  
7

8 **9. SUGGESTED CHANGES IN DISCOVERY LIMITATIONS:**

9 None at this time.

10 **10. TRIAL:**

11 If this matter proceeds to trial, the parties currently believe this matter will be ready  
12 for trial on May 23, 2011. The parties estimate the length of trial to be five (5) trial  
13 days. The parties do not have any ideas on how the trial might be shortened.  
14

15 **11. JURY TRIAL:**

16 No party has requested a jury trial.

17 **12. PROSPECTS FOR SETTLEMENT:**

18 The parties agree that the prospects for settlement of this case are remote.  
19

20 **13. MODIFICATION OF PRETRIAL PROCEDURES:**

21 No suggestions at this time.  
22  
23  
24  
25  
26

1 DATED this 11<sup>th</sup> day of May, 2010.

2 JENNINGS, STROUSS & SALMON, P.L.C.

3  
4 By s/John J. Egbert  
5 John J. Egbert  
6 Paul G. Johnson  
7 The Collier Center, 11th Floor  
8 201 East Washington Street  
9 Phoenix, Arizona 85004-2385  
10 Attorneys for Plaintiff Salt River Project  
11 Agricultural Improvement and Power  
12 District

13 SNELL & WILMER, LLP

14 By s/Lisa M. Coulter (with permission)  
15 Lisa M. Coulter  
16 One Arizona Center  
17 400 East Van Buren  
18 Phoenix, Arizona 85004-2202  
19 Attorneys for Plaintiff Headwaters  
20 Resources, Inc.

21 PERKINS, COIE BROWN & BAIN, P.A.

22 By s/Philip R. Higdon (with permission)  
23 Philip R. Higdon  
24 Rhonda L. Barnes  
25 2901 North Central Avenue  
26 Phoenix, AZ 85012  
Attorneys for Defendants Reynold R. Lee,  
Casey Watchman, Woody Lee, Peterson  
Yazzie, Evelyn Meadows, Herb Yazzie,  
Lorene B. Ferguson, and Cathy Begay

JORDAN & ROSEBROUGH, P.C.

By s/David R. Jordan (with permission)  
David R. Jordan  
101 West Aztec, Suite A  
P.O. Box 840  
Gallup, NM 87305  
Attorneys for Defendants Leonard Thinn  
and Sarah Gonnig

1 COPY of the foregoing filed  
electronically with the Court's CM/ECF  
2 system on this 11<sup>th</sup> day of May, 2010,

3 Clerk of the United States District Court  
Sandra Day O'Connor U.S. Courthouse  
4 401 West Washington Street  
Phoenix, AZ 85003-2156

5  
6 COPY of the foregoing mailed this  
11<sup>th</sup> day of May, 2010, to:

7 The Honorable James A. Teilborg  
United States District Court  
8 Sandra Day O'Connor U.S. Courthouse, Suite 523  
401 West Washington Street, SPC 51  
9 Phoenix, AZ 85003-2156

10  
11 By: s/Meeling Tan